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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE:

GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HENRY HARFIELD
Counsel of Record

SHEARMAN & STERLING
153 East 53rd Street
New York, New York 10022
(212) 483-1000

Of Counsel:

DANFORTH NEWCOMB
ROBERTA BENDER

Attorneys for Petitioner

March 11, 1983

Question Presented for Review

Shall the judicial power of the United States be exercised to coerce a foreign national, who lawfully conducts business in the United States, to act unlawfully in a third country, when there has been no showing that the national interest requires such exercise?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at 691 F.2d 1384 (11th Cir. 1982) and is reproduced as Appendix A. The opinions of the United States District Court for the Southern District of Florida dated June 11, July 6 and July 10, 1982, are unreported but are reproduced as Appendix B. The judgment of the United States Court of Appeals for the Eleventh Circuit is unreported, and is reproduced as Appendix C.

Jurisdiction

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 29, 1982. A petition and suggestion for rehearing *en banc* was denied on January 6, 1983 (Appendix D). This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1)(1976).

Statutes and Regulations Involved

This case involves the due process clause of the fifth amendment to the United States Constitution, U.S. Const. amend. V., which is reproduced in Appendix E. It also involves the Civil Contempt Statute, 18 U.S.C. § 401 (1976), which is reproduced in Appendix F. A statute which is also related to this case is Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bahamian Acts No. 64, *as amended* by the Banks and Trust Companies Regulation (Amendment) Act 1980. It is reproduced in Appendix G.

Statement of the Case

This is a case in which a court in the United States has exercised its discretion to penalize a citizen of Canada for its refusal to violate the criminal laws in a third nation, without any showing of the necessity or relevance of such an order to any interests of the United States.

The Bank of Nova Scotia (the "Bank") is a Canadian chartered bank established 150 years ago with 1,027 Canadian branches and over 200 branches, offices and agencies in 45 other countries. The U.S. Attorney's Office for the Southern District of Florida caused a subpoena duces tecum to be served on the Bank's Miami, Florida agency on September 23, 1981,

calling for the production of certain customer records located at the Bank's Nassau, Bahamas Branch.[1] The Bank declined to produce the documents on the ground that Sections 10(1) and (3) of the Bahamas Banks and Trust Companies Act, 1965, *as amended* ("the Act"), prohibit disclosure of customer records by an officer of the Nassau Branch without the consent of the customer, save for three narrow exceptions that do not apply here (Aff. of P. Graham ¶ 4, reproduced in Appendix H, *infra* at 2h). Both the district court and the Eleventh Circuit[2] recognized that the Bank would be subject to criminal penalties in the Bahamas if it produced the documents. A violation of the Act is punishable by up to two years' imprisonment and a fine of $15,000 (Bahamian).

In this matter, the Bank is a neutral source of information and has not been accused of any wrongdoing. At no time has it been a target of the investigation.

The Bank has done everything in its power under the applicable laws to comply with the subpoena. It has sought but has not obtained a waiver by its customer of the customer's rights under the Act. The Bank does not have standing under Bahamian law to apply to a Bahamian court for an order permitting the release of customer information. The Department of Justice (the "Department") does have standing to apply for such an order (Aff. of P. Graham ¶¶ 6,7, *infra* at 3h), and appears to have grounds for such an application based on possible violations of United States narcotics laws (Aff. of P. Graham ¶ 8, *infra* at 3h). The Department has declined to make any application to the Bahamian courts, and has also failed to make any showing before the district court that the

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1 The documents relate to an individual and to two corporations. The subpoena originally called for similar documents from the Bank's Antigua Branch. In the interest of avoiding unnecessary conflict, the Bank investigated and found that no such documents exist. Accordingly, that part of the subpoena is not in issue.

2 The jurisdiction of the courts below is based on 28 U.S.C. § 1345 (1976).

documents sought were at all relevant or necessary to the grand jury's investigation.[3]

The district court held the Bank in civil contempt, and the Bank appealed that decision to the Eleventh Circuit. On November 29, 1982, the Eleventh Circuit issued an opinion affirming the district court's order, and the Bank's petition for a rehearing and suggestion for a rehearing *en banc* was denied on January 6, 1983.

Reasons for Granting Writ

This case raises an important question of federal law that has not been, but should be, answered by this Court. The court below answered the question in a manner which conflicts with principles enunciated by this Court, by the other circuits and by Congress.

1. *The Importance of the Question.*

This case requires a determination of the extent to which a municipal court should require a person subject to its jurisdiction to act in the territory of a foreign nation in violation of the criminal laws of that foreign sovereign. The question encompasses issues of constitutional magnitude as to the significance of the domestic or foreign status of the party before the Court, as to the denial of due process, and as to the separation of powers as between the executive and judicial branches of Government. The circuits are sharply divided on the issues raised by this case. The conflict results in a disarray that requires resolution by this Court if federal law is to be declared by a single voice in a consistent manner.

The expeditious resolution of these issues is moreover a matter of international significance. Indeed, the reporters'

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3 The Government produced an affidavit *in camera* to the district court on Janaury 13, 1982 regarding the relevance of the documents. This affidavit was not considered by either the district court or the Eleventh Circuit, and neither court made a finding of relevance or materiality prior to enforcing the subpoena.

notes to the most recent Tentative Draft of the *Restatement of Foreign Relations Law of the United States* observe:

> No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.

Restatement of Foreign Relations Law of the United States (Revised), § 420, reporters' notes at 18 n.1 (Tent. Draft 3, 1980.)

There is evidence to support those concerns. The validity of discovery orders that require a non-citizen subject to the jurisdiction of the United States to act abroad in violation of the laws of its home or host country has been and increasingly is challenged by statutory and decisional law of the affected nations. The integrity of United States law is called in question by reason of the inconsistency between the extra-territorial effect sought to be given United States judicial process and denial by United States courts of the extraterritorial effect of foreign laws and decrees. The disparate pronouncements of circuit courts, which are discussed hereafter, provide an added basis for the contention that the administration of justice in the United States is predicated upon political expediency rather than upon legal principle.

Related, and of no less importance, is the question of whether the independence of the judicial branch is impaired. That issue comes into sharp focus in this case for the following reasons. The Department of Justice caused the issuance of the subpoena in question on the ground that the grand jury investigation would be aided in some unspecified manner by production of documents located in the Bahamas. When the petitioner declined to produce the documents on the ground that compliance with the subpoena would violate Bahamian criminal law, the controversy was referred to the courts below. The courts below responded to the Department's demands without any examination or finding of the materiality or

relevance of the documents requested and thus, in effect, abdicated their judicial function.

2. *The Conflict with Applicable Decisions of this Court.*

The decision of the panel below disregards principles declared by this Court. Pursuant to the federal act of state doctrine, this Court refrains from examining the acts of a foreign state which take effect within the territory of that state.

This Court's reluctance to question the act of a foreign nation was made evident in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). In that case, the Court declined to examine the validity of the Cuban government's expropriation of property, because the operative act took place entirely within another nation. The Court noted that the doctrine has " 'constitutional' underpinnings" and "arises out of the basic relationships between branches of government . . . in the area of international relations." *Id.* at 423.

Similarly, a court of the United States will not enforce acts of a foreign government which take effect in this country, if those acts are inconsistent with the laws or public policy of the United States. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Those principles are offended by an order that requires the Bank to produce records in the Bahamas in violation of that nation's bank privacy statute.[4]

As an adjunct of its recognition of territorial rights of sovereignty, this Court has expressed extreme reluctance to enter any order which would obligate a party to commit an act in a foreign country in violation of the laws or public policies of that nation. In *United States v. First National City Bank ("Omar")*, 379 U.S. 378 (1965), the Court reversed an order of the Second Circuit and reinstated an injunction which had been entered by the district court, temporarily freezing an

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4 The invasion of Bahamian sovereignty is not mitigated if the documents are smuggled out of the Bahamas for production elsewhere.

account in a bank's foreign branch. Writing for the majority, Justice Douglas noted that, if its decision were in violation of foreign law, the district court should review the advisability of its order. He stated:

> For overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence. We have, however, no such involvement here, for there is no showing that the mere "freezing" of the Montevideo accounts pending service on Omar, would violate foreign law, cf. *Societe Internationale v. Rogers*, 357 U.S. 197, 211, or place respondent under any risk of double liability. Cf. *Western Union Co. v. Pennsylvania*, 368 U.S. 71. The District Court reserved power to enter any protective order of that character.

Id. at 384. In this case, an order compelling the Bank to produce documents in the Bahamas would place it in direct contravention of foreign law. The Eleventh Circuit's opinion thus disregards the concerns expressed in *Omar*, and indeed this case presents a violation of the due process rights of a foreign national which was not before the Court in *Omar*.

This Court recognizes the importance of respecting foreign privacy statutes, particularly in instances in which a party is subject to conflicting regulations. In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), the petitioner, a Swiss trading company, brought suit for the return of property seized by the Alien Property Custodian under Section 5 of the Trading with the Enemy Act. The Court reversed an order of the district court, which had ruled that, if the petitioner did not produce certain documents in violation of the Swiss secrecy laws, its complaint would be dismissed. Emphasizing the unfairness of ordering a party to produce documents in violation of foreign law, the Court stated:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this

> excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

Id. at 211.

The Bank's plight is more extreme than that faced by the parties in *Omar* and *Rogers*. Unlike the *Omar* situation, in which Justice Douglas found that there had been no showing that compliance with the Court's order would place the respondent in violation of foreign law, an order directing the Bank to produce documents in this case would place it in direct violation of the criminal laws of another sovereign nation. In *Rogers*, the Court declined to issue an order which would have placed the petitioner in violation of Swiss bank privacy laws. In that situation, although the bank was theoretically a party seeking relief under the laws of the United States, the Court pointed out that its position was "analogous to that of a defendant," for it was belatedly seeking the recovery of its assets. 357 U.S. at 210.

In this case, the Bank seeks no relief or special privilege under the laws of the United States. It seeks no more than to continue lawfully to conduct business in those countries in which it is licensed to do so, without subjection to orders by one host country which would oblige it to violate the territorial laws of another host country. That limited aspiration is justified under present federal law. This Court should decide whether the law is to be changed.

3. *The Conflict of Decisions by the Circuit Courts.*

The panel decision below is at odds with the prevailing law, as articulated by several circuits, and thus presents a conflict that should be resolved by this Court. The panel conceded that there is a conflict among the circuits regarding the extent to which a court may enforce a subpoena, even in domestic situations, absent a showing by the Government of relevance and materiality of the documents requested. (See n. 5, *infra* at 5a.) This conflict has, in fact, become further exacerbated since the panel rendered its opinion.

In *United States v. First National Bank of Chicago ("Tripplett")*, No. 80-2713 (7th Cir. Jan. 24, 1983), the Seventh Circuit recently reversed a lower court ruling which had ordered the First National Bank of Chicago to produce certain documents from its branch in Greece in violation of that nation's bank secrecy statute. The court applied the balancing test of the *Restatement (Second) of Foreign Relations* in what it described as a "sensitive balancing of the interests at stake." It noted:

> We think it significant in weighing the hardship factor that the Bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation.
>
> Although the interest of the United States in collecting taxes is of importance to the financial integrity of the nation, the interest of Greece, served by its bank secrecy law is also important, and so conceded by Government counsel (factor (a)).

The court suggested a distinction of the Eleventh Circuit's opinion herein, noting among other things that the Bahamian statute permits a customer waiver, and the Bahamian courts have the discretion to permit disclosure upon proper application. In fact, in this case, the Bank is also a neutral source of information, rather than an adverse party to the litigation; it has sought and not received a customer waiver, and the Government has declined to apply to a Bahamian court for an order of disclosure. Thus, the Bank has made a good faith effort to comply with the subpoena and is in as difficult a position as the defendant in *Tripplett*.

The court below has also departed from the standard adopted by the Third Circuit. The Third Circuit has recognized that grand jury subpoenas are essentially prosecutorial documents, and so requires the Government to demonstrate in all

cases that the items sought are both relevant and necessary to a pending grand jury investigation. In *In Re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973), the court commented:

> [T]hey [grand jury subpoenas] are in fact *almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch*. Grand jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute, without any prior judicial control.

Id. at 90 (footnote omitted) (emphasis added). The Third Circuit has concluded that grand jury subpoenas are not entitled to automatic enforcement, and stated that the Government must show "*in every case* that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In re Grand Jury Proceedings ("Schofield II")*, 507 F.2d 963, 966 (3rd Cir.) (emphasis in original), *cert. denied*, 421 U.S. 1015 (1975).

Similarly, the Second Circuit has recognized that grand jury subpoenas are not entitled to automatic enforcement, particularly in situations in which the production of documents would place a party in violation of the laws of a foreign nation. In *United States v. First National City Bank ("Loveland")*, 396 F.2d 897 (2d Cir. 1968), the court affirmed an order directing the Bank to produce certain documents in Germany, in violation of civil law in that country. The court weighed the critical importance of minimizing the potential conflict among nations against the significance of the documents requested in that action, stating:

> It is not asking too much however, to expect that each nation should make an effort to minimize the potential

> conflict flowing from their joint concern with the prescribed behavior. . . . Where, as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.

Id. at 901 (citations omitted).

No circuit, other than the court below, has imposed contempt penalties on a third party witness for its failure to produce documents in a foreign nation in violation of the criminal laws of that nation. In *In Re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), the bank officer from whom the information was sought was physically within the jurisdiction of the court, and the information sought consisted of his personal testimony. Moreover, in those situations in which courts have ordered the production of documents in violation of foreign secrecy statutes, there has been a finding of at least a minimum of purposeful involvement of the subpoenaed party in the activity which was the subject of investigation. In *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981), the court compelled the production of records of a defendant's foreign subsidiary where the defendant was the subject of a domestic investigation. *Accord, Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert.denied*, 429 U.S. 1096 (1977) (defendant was compelled to produce records held by its foreign office where the records were relevant to defendant's alleged violation of federal securities laws).

We are aware of no other circuit which compels a foreign national, accused of no wrongdoing, to produce in violation of foreign criminal law documents which are not shown to be material or necessary to a pending investigation. The opinion below, which affirmed the enforcement of a grand jury subpoena without any analysis of the importance of the docu-

ments sought or of the interests served by the foreign statute, represents so extreme a negation of principles declared by other circuits that it requires review by this Court.

4. *The Departure from the Accepted and Usual Course of Judicial Proceedings.*

The district court departed from the accepted and usual course of judicial proceedings by imposing contempt penalities on the petitioner in the circumstances of this case, and the court of appeals exacerbated as well as sanctioned that departure so as to call for an exercise of this Court's power of supervision. This Court and Congress have long stated their disapproval of extraterritorial adventures such as the one in this case.

Congress has consistently avoided regulatory interference with the internal affairs of foreign countries. For example, in the Bank Holding Company Act, 12 U.S.C. § 1843(c)(9)(1980), Congress exempted bank holding companies which are organized in foreign countries from regulation of their business conducted outside the United States.

The courts have heretofore refrained from imposing contempt sanctions on foreign nationals for refusal to violate their obligations. The reporters' notes to the *Restatement* state:

> No case is known in which a foreign national has actually been fined or imprisoned in the United States for failure to comply with an order to produce documents located abroad, though such sanctions have been threatened a number of times with respect to both U.S. and foreign nationals.

Restatement of Foreign Relations Law of the United States (Revised) § 420, reporters' notes at 26 n.7 (Tent. Revised Draft No. 3, 1982).

In this case, a noncitizen of this country, which is subject to process of our courts only because it lawfully conducts business here, is victimized by a conflict of sovereigns. As Judge

Kaufman observed in *Loveland*, "[A] court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision." 396 F.2d at 902. The district court and the court of appeals in this case failed to make any such effort.

Conclusion

This petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: New York, New York
March 11, 1983

Respectfully submitted,

Henry Harfield,
Counsel of Record

Shearman & Sterling
153 E. 53rd Street
New York, New York 10022
(212) 483-1000

Of Counsel:

Danforth Newcomb
Roberta Bender

APPENDICES

APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

No. 82-5831.
United States Court of Appeals,
Eleventh Circuit.

Nov. 29, 1982.

King & Spalding, Griffin B. Bell, Charles Kirbo, James A. Pardo, Jr., Atlanta, Ga., Steel, Hector, Davis, Burns & Middleton, Talbot D'Alemberte, Thomas R. Julin, Palm Beach, Fla., for defendant-appellant.

Glenn L. Archer, Jr., Michael L. Paup, Charles E. Brookhart, Alan Hechtkope, Asst. Attys. Gen., Tax Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, *Circuit Judges*, and MORGAN, *Senior Circuit Judge*.

LEWIS R. MORGAN, *Senior Circuit Judge*:

The Bank of Nova Scotia appeals from an order of the United States District Court for the Southern District of Florida holding the Bank of Nova Scotia in civil contempt for failing to comply with an order of the court enforcing a grand jury subpoena duces tecum. The Bank of Nova Scotia (the Bank) presents three arguments against enforcing the subpoena. The Bank first contends that there were insufficient grounds to enforce the subpoena. The Bank also contends that enforcing the subpoena would violate due process. Finally, the Bank argues that the subpoena should not be enforced as a matter of comity between nations. We find the Bank's contentions to be without merit, and therefore we affirm the district court.

I. FACTS

The Bank of Nova Scotia is a Canadian chartered bank with branches and agencies in forty-five countries, including the United States and the Bahamas. A federal grand jury conducting a tax and narcotics investigation issued a subpoena duces tecum to the Bank calling for the production of certain records maintained at the Bank's main branch or any of its branch offices in Nassau, Bahamas and Antigua, Lesser Antilles, relating to the bank accounts of a customer of the Bank.[1] The subpoena was served on the Bank's Miami, Florida agency on September 23, 1981. The Bank declined to produce the documents asserting that compliance with the subpoena without the customer's consent or an order of the Bahamian courts would violate Bahamian bank secrecy laws.[2]

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1 The Bank investigated and found no documents which were requested located at its Antigua branch. Accordingly, that part of the subpoena is not in issue.

2 Banks and Trust Companies Regulations Act of 1965, 1965 Bah. Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, and Section 19 of the Banks Act, III Bah. Rev. Laws, c. 96 (1965), as amended by the Banks Amendment

A hearing was held on the government's motion to compel the Bank to comply with the subpoena on January 13, 1982. At the hearing conflicting evidence was presented as to the degree

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Act 1980, 1980 Bah. Acts No. ____. Both Section 10 and Section 19 are identical. Section 10 of the Bank and Trust Companies Regulation Act as amended provides:

Preservation of secrecy

10.—(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

—(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

—(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this Act and shall be liable on summary conviction to a fine not exceeding fifteen

of control the Miami agency held over documents held by the Nassau branch. The government presented evidence that all banking transactions for accounts in the Bahamian branch could be handled by the Miami agency. The Bank presented evidence that the Miami agency is a one-way conduit for customer communication with the Nassau branch. The Bank also presented an affidavit showing that compliance with the subpoena could expose the Bank to prosecution under the Bahamian bank secrecy law. The affidavit also showed that the government could obtain an order of judicial assistance from the Supreme Court of the Bahamas allowing disclosure if the subject of the grand jury investigation is a crime under Bahamian law and not solely criminal under United States tax laws. The government did not make a showing that the documents sought are relevant and necessary to the grand jury's investigation.[3]

After the district court entered an order compelling the Bank to comply with the subpoena, the Bank's Miami agent appeared before the grand jury and formally declined to produce the documents called for by the subpoena. The district court held the Bank in civil contempt and the Bank brings this appeal.

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thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

The government argues the Bank would not be successfully prosecuted by Bahamian authorities if it complied with the subpoena. In this regard it argues that because Section 10(2)(a) expressly preserves the common law relationship between bank and customers, the Bank is authorized to disclose the requested information. See *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (Banker may disclose banking information concerning a customer where the banker is compelled by law to disclose information); *Barclay's Bank International, Ltd. v. McKinney*, No. 474 (Bah. S.Ct. Feb. 16, 1979). Although the determination of foreign law is reviewable on appeal, F.R.Civ.P. 44.1, we shall assume for purposes of this appeal that the Bank will be subject to criminal sanctions in the Bahamas.

3 At a January 13, 1982 hearing the government submitted an *in camera* affidavit regarding the relevance of the documents sought. This document was not considered by the court below. We conclude it is unnecessary to view the document. See Part II, *infra*.

II. RELEVANCE OF THE DOCUMENTS

The Bank urges this court to follow the Third Circuit's holdings in *In re Grand Jury Proceedings*, 486 F.2d 85 (Schofield I) (3rd Cir. 1973), and *In re Grand Jury Proceedings*, 507 F.2d 963 (Schofield II) (3rd Cir. 1975), *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975), and require the government to show that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose. The government does not dispute that the district court enforced the subpoena without making a finding that the documents sought were relevant or necessary for the grand jury's investigation. Rather, the government argues this case is controlled by *In re Grand Jury Proceedings. United States v. McLean*, 565 F.2d 318 (5th Cir. 1977), and *In re Grand Jury Proceedings. United States v. Guerrero*, 567 F.2d 281 (5th Cir. 1978),[4] where the Fifth Circuit declined to follow the *Schofield* rule absent some showing of harassment or prosecutorial misuse of the system. The bank argues that the *Schofield* rule, however, should be applied to cases such as this where foreign relations are implicated and where alternative methods are available to obtain the requested information that do not require the Bank to violate foreign law.

[1] The guidelines established by the Third Circuit in *Schofield* are not mandated by the Constitution; the Third Circuit imposed the requirements under that court's inherent supervisory power. *Schofield*, 486 F.2d at 89; *McLean*, 565 F.2d at 320. We decline to impose any undue restrictions upon the grand jury investigative process pursuant to this court's supervisory power.[5]

4 The Eleventh Circuit, in the en banc decision of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the Former Fifth Circuit decided prior to October 1, 1981.

5 Other circuits have declined to adopt such a rule. See, *e.g.*, *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978). See also *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1981) (reserving question of whether preliminary showing must be made in every case).

It is unnecessary to repeat here the vital role the grand jury plays in our system of jurisprudence. See, *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404, 407-09 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). As stated by the court in *McLean*:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973).

In re Grand Jury Proceedings. United States v. McLean, 565 F.2d at 320.

[2] While it is true courts should not impinge upon the political prerogatives of the government in the sensitive area of foreign relations, *Chicago and Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948), accepting the Bank's position would be a greater interference with foreign relations than the procedures employed here. In essence, the Bank would require the government to choose between impeding the grand jury's investigation and petitioning the Supreme Court of the Bahamas for an order of disclosure.

This court is cognizant that international friction has been provoked by enforcement of subpoenas such as the one in question. See, Restatement (Revised) of Foreign Relations Law of the United States § 420, Reporter's Note 1. See generally, *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547, 616, 629-31, 639-40, 650 (H.L.) (criticizing the United States for claims of "jurisdiction over foreigners in respect to acts done outside the jurisdiction of that country"). But as recognized in *United States v. First National City Bank*, 379 U.S. 378, 384-85, 85 S.Ct. 528, 531-32, 13 L.Ed.2d 365 (1965), the various federal courts remain open to the legislative and executive branches of our government if matters such as this prove to have international repercussions. See, *e.g.*, Convention on Double Taxation of Income, September 27, 1951.

United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No. 2316 (Swiss-US Tax Treaty providing for exchange of information for, inter alia, the prevention of fraud).

III. DUE PROCESS

[3] The Bank contends that compliance with the subpoena would require it to violate the Bahamian bank secrecy law and therefore enforcing the subpoena and imposing contempt sanctions for noncompliance violates due process under *Societe Internationale Power Participations Industriells v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). The Bank argues that once it has shown Bahamian law bars production of the documents and that it is a disinterested custodian of the documents due process prohibits enforcement of the subpoena. We disagree.

The Bank attempts to fashion a due process defense to the contempt proceedings because of its lack of purposeful involvement or responsibility in the subject matter before the court. In essence, the Bank asserts it is fundamentally unfair to require a "mere stakeholder" to incur criminal liability in the Bahamas. The Bank's position does not withstand analysis.

In *Societe Internationale* a Swiss holding company brought an action to recover assets seized under the Trading with the Enemy Act. The district court had ordered production of certain banking records of a Swiss bank pursuant to the government's discovery request. The holding company failed to comply with the court's order, after good faith efforts were made to comply, on the grounds that compliance would violate Swiss penal laws. The district court then dismissed the suit with prejudice due to noncompliance with the production order. In reversing the district court, the Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law. *Societe Internationale*, 357 U.S. at 105-06, 78 S.Ct. 1092-93; *United States v. Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 671 (1981). *Societe Internationale* held only that the

sanction of outright dismissal of that plaintiff's complaint could not be imposed where that plaintiff had acted in good faith, was unable to comply because of foreign law, and was entitled to a hearing on the merits in order for the Trading with the Enemy Act to withstand constitutional challenge. *Societe Internationale*, 352 U.S. at 211-12, 78 S.Ct. at 1095-96. Compare, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 n. 14, 100 S.Ct. 2455, 2464 n. 14, 65 L.Ed.2d 488 n. 14, (1980) (emphasizing bad faith vs. inability to comply dichotomy). See *United States v. Vetco*, 644 F.2d at 1329-30. The Court left the district court free to impose other sanctions. *Societe Internationale*, 357 U.S. at 213, 78 S.Ct. at 1096. *Societe Internationale* does not stand for the proposition that a lawfully issued grand jury subpoena may be resisted on constitutional grounds where compliance would violate foreign criminal law. See, *e.g.*, *United States v. Vetco, Inc.*, 644 F.2d at 1329; *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1979); *SEC v. Banca Della Suizzera Italiance*, 92 F.R.D. 111 (S.D.N.Y. 1981).

The Bank has failed to bring itself within the holding of *Societe Internationale*. The district court found the Bank had not made a good faith effort to comply with the subpoena in its order of June 11, 1982. Record at 140. The Bahamian government has not acted to prevent the Bank from complying with the subpoena. Finally, the Bank is not being denied a constitutionally required forum to recover confiscated assets.[6]

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6 It is difficult to fashion due process protections recognizing the differential argued by the Bank, *i.e.*, stakeholder vs. participant. If fairness is the key, as is asserted here, then it seems hardly offensive to "traditional notions of fair play and substantial justice," *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940), to exempt entities who do business in the United States and thereby voluntarily bring themselves within the jurisdiction of our courts and legislatures from the burdens of United States law.

IV. COMITY

[4] The Bank's final contention is that comity between nations precludes enforcement of the subpoena. The Bank argues that the district court improperly analyzed this case under the balancing test of the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976).[7] The district court concluded that because compliance with the subpoena may cause the Bank to violate Bahamian penal laws, it was appropriate to follow the balancing test adopted in *Field*. Because we conclude this case is controlled by *Field*, we affirm the court below.

In *Field* contempt penalties were upheld against a nonresident alien who, having been subpoenaed to testify before a grand jury while present in the United States, refused to answer questions before the grand jury, despite the witness' assertion that the very act of testifying would subject him to criminal penalties in his country of residence. *Id.* at 405. The grand jury was investigating the use of foreign banks in evading tax enforcement. Field was an officer of a bank located in the Grand Cayman Islands, British West Indies, and was subpoenaed to testify about matters concerning his bank

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7 Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

and its clients. *Id.* at 405-06. After balancing the competing interests of the United States and the Cayman Islands under the Restatement approach, the court affirmed the district court's imposition of contempt sanctions against Field. *Id.* at 407-09.

The situation before us is similar to that in *Field* in all material respects. The Bank has been subpoenaed while subject to the jurisdiction of our courts and has been required to disclose information before a grand jury even though the very fact of disclosure may subject the Bank to criminal sanctions by a foreign sovereign.

The Bank attempts to distinguish *Field* from the case before us on four grounds. The Bank first asserts that the Bank itself is not under investigation by the grand jury, unlike the situation in *Field*. See *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) (Castle Bank and Trust Company of Nassau, Bahamas under investigation in 1972 as part of narcotics investigation known as "Operation Trade Winds"). A careful reading of *Field* reveals that the fact that Castle Bank and Trust Company was under investigation did not affect the court's analysis. That court was concerned with the proliferation of foreign secret bank accounts utilized by Americans to evade income taxes and conceal crimes. *In re Grand Jury Proceedings. United States v. Field*, 523 F.2d at 407-08. The instant subpoena calls for the production of certain records relating to bank accounts of a United States citizen pursuant to a tax and narcotics investigation.

Second, the Bank argues this case is distinguishable from *Field* because documentary evidence is requested here rather than testimonial evidence as in *Field*. The distinction, while real, is immaterial. The case before us concerns the relations among nations; whether the subpoena will be enforced is a matter of international comity. *Id.* at 407. Comity is "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017, 92 S.Ct. 1294, 31

L.Ed.2d 479 (1972). Whether the requested information is testimonial or documentary, the effect on the competing state interests will be the same. The deference accorded the Bahamian interest is not to be diminished by the form of the requested information.

Third, the Bank argues this case is distinguishable from *Field* because the instant subpoena calls for information located in the Bahamas instead of the United States. This argument is without merit for two reasons. First, the disclosure to the grand jury will occur in this country. See *United States v. Vetco, Inc.*, 644 F.2d at 1332. Second, the affront to the Bahamas occurs no matter where the information is originally located; the interest of the Bahamas in preserving the secrecy of these records is impinged by the fact of disclosure itself.

Finally, the Bank contends the government "could avoid rather than provoke disrespect for the sovereignty of a friendly nation" by pursuing the alternative of applying for an order of judicial assistance permitting disclosure from the Supreme Court of the Bahamas. Brief of Appellant at 18. See *United States v. Vetco, Inc.*, 644 F.2d at 1332; *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); Restatement (Revised) of Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, 1982). Applying for judicial assistance, however, is not a substantially equivalent means for obtaining production because of the cost in time and money and the uncertain likelihood of success in obtaining the order. According to the affidavit from a member of the Honorable Society of Lincoln's Inn, England, and of the Bahamas Bar, the Supreme Court of the Bahamas does not have power to order disclosure if the subject of the investigation is criminal only under the tax laws of the United States. Therefore, it is not clear to any degree of certainty that the Bahamian court would order disclosure of all the requested documents.[8]

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8 The Bank conceded at oral argument that if the grand jury is conducting a tax investigation the documents could not be obtained through the judicial assistance procedure.

The judicial assistance procedure does not afford due deference to the United States' interests. In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to be allowed to do something lawful under United States law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.

In *Field* the vital role of a grand jury's investigative function to our system of jurisprudence and the crucial importance of the collection of revenue to the "financial integrity of the republic" outweighed the Cayman Islands' interest in protecting the right of privacy incorporated into its bank secrecy laws. *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d at 407-08. The United States' interest in the case before us has not been diminished since *Field* was decided. The Bank asserts the Bahamas' interest in the right of privacy; this interest is similarly outweighed. A Bahamian court would be able to order production of these documents. Banks and Trust Companies Regulation Act, 1965 Bah. Acts No. 64, § 10(I)(iii), as amended 1980 Bah. Acts No. 3. In addition, numerous officials, employees, attorneys, and agents of the Bank of Nova Scotia or the Central Bank of the Bahamas may disclose information regarding the account in the performance of their various functions under the Bank Act. *Id.* § 10(1)(a-e). It is incongruous to suggest that a United States court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal. *In re Grand Jury Proceedings. United States v. Field*, 535 F.2d at 408. A statute that is "hardly a blanket guarantee of privacy" does not present a Bahamian interest sufficient to outweigh the United States' interest in collecting revenues and insuring an unimpeded and efficacious grand jury process. See *United States v. Payner*, 447 U.S. 727, 731, 100 S.Ct. 2439, 2444, 65 L.Ed.2d 468 n.4 (1980) (predecessor statute identical in relevant parts held not to create a reasonable expectation of privacy).

V. CONCLUSION

Absent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process. It is unfortunate the Bank of Nova Scotia suffers from differing legal commands of separate sovereigns, but as we stated in *Field*:

> In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.

In re Grand Jury Proceedings. United States v. Field, 535 F.2d at 410.

For the reasons stated above, the judgment entered by the district court is

AFFIRMED.

APPENDIX B

OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

—vs.—

BANK OF NOVA SCOTIA

CASE NO. GRAND JURY 81-FL-1

JUNE 11, 1982

On September 23, 1981 a Federal Grand Jury Subpoena duces tecum was served on the Florida agency of the Bank of Nova Scotia, a branch of that bank which operates in Miami, Florida. The subpoena called for the production of certain records maintained at the main branch or any of the branch offices of the Bank of Nova Scotia in Nassau, Bahamas, in Antigua, Lesser Antilles, relating to bank accounts of Robert Twist, Sr., Lesser Antilles Trading Company, Ltd. and/or Latco Development Corporation d/c/b/a Ambassador Jet. The basic position of the bank is that compliance with the subpoena will subject the bank to criminal liability in the Bahamas. Papers filed by the bank state that there are no records which were requested that are being held by its Antigua branch. Thus this order will only be concerned with Bahamian records.

Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bahamian Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act 1980 provides in pertinent part:

(1) No person who has acquired information in his capacity as

(a) director, officer, employee or agent of any licensee or former licensee. . . shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this act, as the case may be, except

(i) for the purpose of the performance of his duties or the exercise of his functions under this act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas, or under the provisions of any law of the Bahamas.

(2) Nothing contained in this section shall

(a) prejudice or derogate from the rights and duties subsisting in common law between the licensee and his customers; or

(b) prevent the licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this act and shall be liable on summary conviction to a fine not exceeding $15,000 or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Inasmuch as compliance with the subpoena may cause the Bank of Nova Scotia to be subject to criminal charges, this

Court finds it appropriate to follow the balancing test set forth in Sections 39 and 40 of the *Restatement (Second) of the Foreign Relations Law of the United States. United States v. Field*, 532 F.2d 404 (5th Cir. 1976). Under this test there are five factors for consideration. These are:

(a) The vital interests of each of the states

(b) The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person

(c) The extent to which the required conduct is to take place in the territory of the other state

(d) The nationality of the person

(e) The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The Court finds in weighing the various factors that this subpoena should be enforced.

As to the first factor, it seems apparent that the interest of the United States in enforcing the subpoena in order to further the investigatory function of the grand jury is greater than the Bahamian interest in secrecy. The Bahamian Secrecy Statute does not provide a total prohibition of disclosure for there are a number of exceptions including disclosure ordered by a Bahamian court. It would be anomalous to give the target of this investigation, an American citizen, greater protection of his Bahamian banking records than he could expect in his United States bank accounts. *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980). Since under the Bahamian Act a court of the Bahamas could order disclosure in connection with an investigation conducted in the Bahamas, the bank's customer's right of privacy should not receive greater protection merely because a foreign tribunal is conducting the investigation.

As to the second factor, inconsistent enforcement action may impose some hardship on the bank. However, the bank has not

made a good faith effort to either obtain the consent of the customer, apply to the court of the Bahamas for an order requiring disclosure or to seek a waiver from the Bahamian government. At this time the Court cannot find with certainty whether the hardship would be actual or merely theoretical but it does appear that the bank has failed to make a good faith effort to comply with the subpoena. *United States v. Vetco*, 644 F.2d 1324 (9th Cir. 1981).

The third and fourth factors are the extent to which the required conduct is to take place in the territory of the other state and the nationality of the person. While the records must be gathered in the Bahamian branch and sent to the Florida branch of the Bank of Nova Scotia, the actual disclosure will be made in the United States rather than in the Bahamas. The Court does not find the Government's argument with regard to the nationality of the bank convincing. Neither does it find it to be a significant factor in the circumstances of this case.

As to the last factor, enforcement of the subpoena will help to insure compliance with the Grand Jury's goals of investigating criminal matters. While enforcement in some respects ameliorates the privacy interests which the Bahamian statute attempts to protect, the stated exceptions to the non-disclosure provisions of the statute indicate that enforcement is not an unreasonable diversion from these concerns.

It is

ORDERED and ADJUDGED that the subpoena issued to the Miami branch office of the Bank of Nova Scotia shall be enforced.

DONE and ORDERED in Chambers this 11th day of June, 1982.

James C. Paine /s/

UNITED STATES DISTRICT JUDGE

cc: Richard D. Humphrey
Veda Carney, Esq.
Thomas R. Julin

ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,

Plaintiff,

—VS.—

THE BANK OF NOVA SCOTIA,

Defendant.

CASE NO 81-1

July 6, 1982

ORDER GRANTING MOTION TO HOLD THE BANK OF NOVA SCOTIA IN CONTEMPT

This cause came before the Court on the Government's motion to hold The Bank of Nova Scotia in contempt for refusing to comply with the June 11, 1982 order of this Court enforcing a federal grand jury subpoena. The Court having considered the evidence submitted at the hearing on this motion as well as the memorandum of law and oral arguments of counsel for the parties, it is

ADJUDGED that THE BANK OF NOVA SCOTIA is in contempt of this Court because of its failure to produce records subpoenaed from its Bahamian branch before the federal grand jury in Fort Lauderdale, Florida. It is further,

ORDERED that The Bank be brought before the Court on five days notice following completion of all proceedings seeking review of this Court's action in this case and at that time

the Court will impose a civil penalty on The Bank until compliance with the subpoena and the order of this Court.

DONE and ORDERED in Chambers at Dade County, Florida, this 6th day of July, 1982.

James C. Paine /s/
UNITED STATES DISTRICT JUDGE

cc: Richard Humphrey, Esq.
Veta M. Carney, Esq.
Talbot D'Alemberte, Esq.

OPINION OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

—v.—

BANK OF NOVA SCOTIA

CASE NO. GRAND JURY 81-FL-1

JULY 10, 1982

It has come to the attention of the court that its order of July 6, 1982, is defective in that it is not a final, appealable order. Although the court is not willing to grant the government's motion to amend order in full and jail the local agent of the Bank of Nova Scotia merely to expedite an appeal, the court is desirous that its order be final so that it may be appealed as soon as possible. The contempt involved is that of the Bank of Nova Scotia as an entity, not that of its local agent.

This court finds as a matter of fact that:

1. This court enforced a grand jury subpoena duces tecum.

2. The bank as a corporate body decided through its officers and agents to make the documents requested unavailable to the person it designated as custodian of records.

3. The bank's Miami agent appeared before the grand jury on June 30, 1982, and declined on behalf of the bank to produce the documents.

This court finds as a matter of law that the Bank of Nova Scotia has resisted its lawful process and order by refusing to comply with the June 11, 1982, order enforcing a federal grand jury subpoena.

In accord with 18 U.S.C. § 401, this court finds the Bank of Nova Scotia in civil contempt and imposes a sentence of $500.00 per day, beginning three days from the date this order is signed and continuing until the day prior to the date on which the Bank of Nova Scotia complies with the order of June 11, 1982, or continuing until the date this grand jury expires, whichever may be sooner.

DONE and ORDERED this 10th day of July, 1982, at West Palm Beach, Florida.

James C. Paine /s/

JAMES C. PAINE
UNITED STATES DISTRICT JUDGE

cc: Richard Humphrey
Veta M. Carney
Talbot D'Alemberte

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5831

January 25, 1983

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, *Circuit Judges*, and MORGAN, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 29, 1982

ISSUED AS MANDATE: JANUARY 25, 1983

APPENDIX D

TO ALL PARTIES BELOW:

No. 82-5831
IN RE: GRAND JURY PROCEEDINGS
U.S.A. vs. BANK
District Court No. MISC 81-00001

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

☐ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

☒ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

NORMAN E. ZOLLER, Clerk

By: Kemura L. Smith /s/
Deputy Clerk

CC: Mr. James A. Pardo
Mr. Glenn L. Archer, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5831

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion November 29, 1982, 11 Cir., 198__, _____ F.2d _____).

(January 6, 1983)

Before FAY and CLARK, *Circuit Judges* and MORGAN, *Senior Circuit Judge*.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Peter Fay /s/

United States Circuit Judge

APPENDIX E

U. S. CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

18 U.S.C. § 401

§ 401. *Power of court*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX G

BAHAMIAN ACT
No. 3 of 1980

An Act to amend the Banks and Trust Companies Regulation Act, 1965.

(Assented to: 24th March, 1980)
(Commencement: 24th March, 1980)

Enacted by the Parliament of The Bahamas.

1. This Act may be cited as the Banks and Trust Companies Regulation (Amendment) Act, 1980.

2. Section 10 of the Banks and Trust Companies Regulation Act, 1965 is repealed and the following section substituted—

10. —(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

81-1 (Ft. L.)

In Re: Grand Jury Proceedings

UNITED STATES

—Against—

BANK OF NOVA SCOTIA

COMMONWEALTH OF THE BAHAMAS
New Providence

Affidavit

PETER D. GRAHAM, being sworn says:

1. I am a partner in the firm of Graham, Thompson and Co. of Nassau, Bahamas and I make this Affidavit in opposition to the motion by the United States Department of Justice (the "Department") for an order compelling the Bank of Nova Scotia (the "Bank") to comply with a Grand Jury subpoena served on September 23, 1981. The subpoena requires production of customer records maintained at the Bank's branch in Nassau, Bahamas. As explained below, the Branch's officers will be subject to criminal prosecution in the Bahamas should the Branch produce records required by the subpoena. However, the Department—and not the Bank—can avoid such liability to the Bank by application to the Bahamian court for an order directing production of the records.

BACKGROUND

2. I obtained my Law Degree (LL.B.) from the University of London, England and was called to the Bar of England and Wales in 1949. I am a member of The Honorable Society of Lincoln's Inn, England and a member of The Bahamas Bar. I was a member of the Bahamas Parliament from 1956 through 1972 and served as Minister of Housing and Labor in the Bahamas Government from 1964 through 1967. I am fully qualified to practice, and have practiced in all the courts of law of the Commonwealth of The Bahamas.

3. For purposes of this Affidavit, I have reviewed (1) The Grand Jury Subpoena served September 23, 1981 and (2) the papers submitted in support of the motion by the Department to compel compliance with the subpoena.

THE ACT

4. The Bank's Nassau branch is licensed to do business in the Bahamas by the Government of the Commonwealth of The Bahamas and is subject to the Banks and Trust Companies Regulation Act of 1965 as amended (the "Act"), a copy of which is attached as Exhibit A. Section 10(1) of the Act prohibits disclosure of customer records by an officer of the Branch without consent of the customer, save for three limited exceptions:

> (I) For the purpose of the performance of his duties or the exercise of his functions under this Act, if any, or
>
> (II) For the purpose of the performance of his duties within the scope of his employment, or
>
> (III) When a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas, or under the provisions of any law of the Bahamas.

Section 10(3) of the Act provides that contravention of Section 10(1) is a criminal offense punishable by up to two years imprisonment or a fine of up to $15,000.00 or to both such

fine and imprisonment. The Act articulates a fundamental policy of the Bahamas, and the 1980 amendment emphasizes the importance of that policy.

5. Production of records required by the subpoena will expose the Branch's officers to prosecution under the Act unless one of the three narrow exceptions of Section 10(2) are met. However, from my review of the papers submitted in support of the Department's motion, no exception appears to be met.

6. Although the Department claims that the Bank may apply to a Bahamian court for an order permitting it to comply with the subpoena, I am aware of no statutory or common law basis for such an application. Such an application would defeat the purpose of the Act.

7. On the other hand, the Department may apply for such an order of judicial assistance permitting disclosure. Pursuant to Section 10(1)(E)(111) of the Act, the Department may apply to the Supreme Court of The Bahamas for an order permitting disclosure of the documents requested. While the Bahamas subscribes to the Anglo-American doctrine that one country will not enforce the fiscal laws of another, the Supreme Court of The Bahamas has the power to order such disclosure where the criminal activity which is the subject of investigation by the Department is both criminal under Bahamian law, and is not criminal merely under the tax laws of the United States.

8. It appears from the papers submitted in support of the Department's motion that the Department's investigation is, in part, related to possible criminal violation of the narcotics laws of the United States, and if that is correct, it would appear that the Department may have grounds for application to the Bahamian Supreme Court for an order permitting the disclosure of bank records relevant to such criminal activity.

9. On the basis of my experience as a member of the Bahamas Parliament and a Minister of the Bahamas Govern-

ment, I would regard it as a serious affront to and invasion of the sovereignty of the Bahamas if, granted the availability of judicial assistance in the Bahamas, a foreign court were nevertheless to order a Bahamian resident to violate the laws of the Bahamas to suit the convenience of foreign government officials.

SWORN to before me the
12th day of January, 1982

Peter D. Graham /s/

Notary Public
of
the Commonwealth of the Bahamas

APPENDIX I

Rule 28.1. Listing of Parents, Subsidiaries and Affiliates.

BNS International (Hong Kong) Limited
BNS International (Ireland) Limited
The Bank of N.T. Butterfield & Son Limited
The Bank of Nova Scotia Asia Limited
The Bank of Nova Scotia Channel Islands Limited
The Bank of Nova Scotia Trust Company Channel Islands Limited
The Bank of Nova Scotia International Limited
The Bank of Nova Scotia International (Curacao) N.V.
Bank of Nova Scotia Properties Inc.
Bernard Sunley Building Limited
BNS International (Panama) S.A.
BNS International (United Kingdom) Limited
The Bank of Nova Scotia Jamaica Limited
The Bank of Nova Scotia Trust Company Jamaica Limited
The Bank of Nova Scotia N.V.
The Bank of Nova Scotia Trinidad & Tobago Limited
The Bank of Nova Scotia Trust Company of the West Indies Limited
The Bank of Nova Scotia Trust Company (Bahamas) Limited
The Bank of Nova Scotia Trust Company (Caribbean) Limited
The Bank of Nova Scotia Trust Company (Cayman) Limited
The Bank of Nova Scotia Trust Company of New York
The Bank of Nova Scotia Trust Company (United Kingdom) Limited
Brunswick Square Limited
Chargex Limited
Empire Realty (Cayman) Limited
Export Finance Corporation of Canada Limited
Maduro & Curiel's Bank N.V.
MHA Property Ltd.
MHB Property Ltd.
MHE Property Ltd.

MHF Property Ltd.
MHG Property Ltd.
MHH Property Ltd.
MHI Property Ltd.
MHJ Property Ltd.
MHK Property Ltd.
MHM Property Ltd.
The Nova Scotia Corporation
Schroder, Darling and Company Holdings Limited
Schroder, Darling and Company Limited
Scotia Centre Limited
Scotia Factors Limited
Scotia Leasing Limited
Scotia Mortgage Corporation
Scotia Realty Limited
Scotia-Toronto Dominion Leasing Limited
Scotia Ventures Limited
Scotiabank de Puerto Rico
Scotiafund Financial Services Ltd.
Singapore Gold Clearing House Private Limited
Vancouver Center Development Limited
The West India Company of Merchant Bankers Limited
Windsor Developments Limited